PRODUCT LIABILITY/Restrictions on Frivolous Legal Actions

SUBJECT: **Product Liability Fairness Act . . . H.R. 956. Gorton (for Brown) amendment No. 599 to the Gorton substitute amendment No. 596.**

ACTION: AMENDMENT AGREED TO, 56-37

SYNOPSIS: As passed by the House, H.R. 956, the Product Liability Fairness Act, will establish uniform Federal and State civil litigation standards for product liability cases and other civil cases, including medical malpractice actions.

The Gorton substitute amendment would apply only to Federal and State civil product liability cases. It would abolish the doctrine of joint liability for noneconomic damages, would create a consistent standard for the award of punitive damages and would limit such damages, and would encourage the adoption of alternative dispute resolution mechanisms.

The Gorton (for Brown) amendment would amend rule 11 of the Federal Rules of Civil Procedure to forbid filing suit or taking other legal action without first determining the truth of the facts forming the basis of the claim by conducting a full investigation of those facts. Additionally, the amendment would make court sanctions for violations of rule 11 mandatory. Finally, reimbursing parties injured by frivolous court actions with the amounts collected from sanctions for such actions would be given a higher priority.

Those favoring the amendment contended:

From 1983 to December, 1993, rule 11 of the Federal Rules of Civil Procedure provided strong protections from frivolous civil suits. The new rule 11 guts those protections. The Brown amendment would restore the effectiveness of the rule, but would retain some of the recent changes.

The main purpose of the Brown amendment is to reinstate mandatory sanctions for bringing frivolous suits. Prior to 1983, parties were able to file thoughtless, reckless, and harassing pleadings secure in the knowledge that they had nothing to lose. According to three Supreme Court Justices, the new 1993 rule restores that ability because it does not require someone to investigate the facts that they are alleging in a case to make certain that they are true before bringing them to court.

(See other side)

YEAS (56)

Republicans (46 or 88%)		Democrats (10 or 24%)
Abraham	Kassebaum	Baucus
Ashcroft	Kempthorne	Bryan
Bennett	Kyl	Conrad
Brown	Lott	Dorgan
Burns	Lugar	Johnston
Chafee	Mack	Kerry
Coats	McCain	Kohl
Cohen	McConnell	Nunn
Coverdell	Murkowski	Reid
Craig	Nickles	Robb
D'Amato	Packwood	
DeWine	Pressler	
Dole	Roth	
Domenici	Santorum	
Faircloth	Simpson	
Frist	Smith	
Gramm	Snowe	
Grams	Specter	
Grassley	Stevens	
Gregg	Thomas	
Helms	Thompson	
Hutchison	Thurmond	
Inhofe	Warner	

NAYS (37)

Republicans (6 or 12%)	Democrats (31 or 76%)	
Campbell	Akaka	Hollings
Cochran	Bingaman	Inouye
Gorton	Boxer	Kerrey
Hatch	Bradley	Lautenberg
Jeffords	Breaux	Leahy
Shelby	Byrd	Levin
	Daschle	Lieberman
	Dodd	Mikulski
	Feingold	Moseley-Braun
	Feinstein	Moynihan
	Ford	Murray
	Glenn	Pell
	Graham	Rockefeller
	Harkin	Sarbanes
	Heflin	Simon
		Wellstone

NOT VOTING (7)

Republicans (2)	Democrats (5)
Bond-[2]	Biden-[2]
Hatfield-[2]	Bumpers-[2]
	Exon-[2]
	Kennedy-[2]
	Pryor-[2]

EXPLANATION OF ABSENCE:
1—Official Buisiness
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:
AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

In 1993, the Supreme Court voted to submit this proposed rule change to Congress. Some Senators have contended that the 6-3 vote in favor of submitting this rule change to Congress indicates that 6 Justices support it. This contention is false. The Rules Enabling Act establishes the manner in which Federal civil procedures are devised. First, the Judicial Conference, which is composed of judges from all levels of the judiciary, appoints a committee to study any proposed change or changes. Second, the Conference reviews its committee's report and makes recommendations which are submitted to the Supreme Court. Third, the Supreme Court reviews those recommendations and makes recommendations to Congress. Finally, Congress has 6 months in which to pass a bill disapproving proposed changes or they go into effect. However, as both Chief Justice Rehnquist and Justice White noted in transmitting the recommended rule 11 change to Congress, the Supreme Court's role has historically been pro forma. Chief Justice Rehnquist specifically disavowed any approval or disapproval of the proposed change. Given this fact, it is very significant that 3 Justices--Thomas, Scalia, and Souter--felt so strongly about the proposed change that they broke with past practice and voted against it. Thus, the 6-3 vote indicated an unprecedented level of hostility to a proposed civil rule change.

Some Senators have next suggested that Members should have tried to change this rule during the 6-month window provided by the Rules Enabling Act, instead of on this "unrelated" bill. Some Members did, but they were blocked by the leadership last Congress from bringing their proposal to a vote. The Senate is now considering a bill that deals with the operations of civil courts, so we believe that it is appropriate to consider this amendment which deals with the treatment of frivolous civil cases. We were blocked from proceeding at the earlier, more appropriate, opportunity, but we will not be blocked from proceeding now.

A fear seems to exist among some Members that the Brown amendment would effectively bar the courthouse door for injured parties by threatening draconian punishments if their cases were found to be meritless. A decade of experience proves that this fear is unwarranted. From 1983 to 1993, when the Brown amendment was essentially in effect, there was no shortage of Federal civil lawsuits. The sole difference from prior experience was that there was better preparation, and therefore fewer frivolous suits. One survey (the Nelken study) of lawyers and judges in the northern district of California, for example, found that 46 percent of respondents increased their pre-filing factual inquiries when they knew that sanctions for frivolous filings were mandatory, and 33 percent engaged in additional pre-filing legal inquiries. In other words, attorneys established a solid legal and factual basis before filing because they knew they would be punished if they did not. Another study (by the Federal Judicial Center) found that 80.9 percent of Federal judges thought that the pre-1993 rule 11 had a positive effect on litigation.

A major reason that the right to sue for injuries did not diminish during the decade this rule was in effect was that it did not require harsh sanctions. Judges retained the discretion to determine the appropriate punishment for bringing a frivolous suit. Similarly, the Brown amendment would leave this decision with the judges. For a technical violation, any sanction would likely be minor; for larger, more reckless violations, the sanctions would likely and appropriately be larger. Considering that the escalating number of lawsuits in America has led many observers to call for the adoption of an English "loser pays" civil justice system, the Brown amendment is a model of restraint.

In addition to making punishment of frivolous filings mandatory, the Brown amendment would amend rule 11 to give greater priority to providing compensation to those parties that have been injured by frivolous filings. The 1993 rules change provided that proceeds from any sanctions should, as a matter of priority, go to the Government. We disagree with this focus, and thus applaud this additional element of the Brown amendment. The rights of injured parties should come first.

Finally, this amendment would not do away with all the 1993 changes to the rule. For example, it would retain the 21-day safe harbor provision. If a defendant were to allege a violation of rule 11, the plaintiff would still have 21 days in which to make corrections or withdraw the action without penalty. We believe that this provision of the 1993 rule change, and other provisions of that change, were meritorious, and are pleased that they have been retained by the Brown amendment.

In sum, this amendment would make sanctions mandatory for frivolous Federal civil suits and it would increase the compensation for those parties that are injured by such suits. From 10 years of experience we know that this amendment will work. We therefore urge our colleagues to give it their approval.

Those opposing the amendment contended:

Argument 1:

The issues raised by the Brown amendment are very complex. The prevailing view throughout our Nation's history has been that the courts should be primarily responsible for devising their own rules of procedure. Congress has given itself a role in determining those rules, though, through the Rules Enabling Act. That Act requires the Judicial Conference to consider proposed rules changes, and then to submit its recommendations to the Supreme Court, which in turn makes its own recommendations. The Supreme Court's recommendations are adopted unless Congress passes a bill within 6 months disapproving of them. The change to rule 11 of the Federal Rules of Civil Procedure, which is the subject of the Brown amendment, was thus not made lightly. The ablest Federal judges from all levels of the Federal judiciary sit on the Judicial Conference. After years of serious consideration, those Federal judges proposed changing rule 11, and by a 6-3 vote the Supreme Court concurred. Congress did not disapprove of the change, and it went into effect. We apologize to our colleagues for not knowing that they had in fact introduced a bill to disapprove the change, but the

fact remains that the best legal minds in America gave it their endorsement. Given this fact, we should not rush to judgment by approving the Brown amendment; at a minimum, the Judiciary Committee should hold hearings before the full Senate votes.

We do not dispute that some frivolous suits are filed. One example that has been cited by our colleagues, in which McDonald's was sued for failing to warn a man that the milkshake he purchased may cause him to have an accident if he spilled it on himself, is a case in point. However, bad cases make bad law; we should not pass the severe restrictions in the Brown amendment based on the tiny minority of cases that are frivolous.

Doing so could have very detrimental consequences because novel theories are often necessary to win civil rights and discrimination cases. For instance, when Thurgood Marshall filed the Brown versus Board of Education case to challenge the notion of "separate but equal," the plaintiffs relied greatly on psychological and sociological evidence--the so-called Brandeis brief. That evidence demonstrated the devastating impact that separate educational systems for the races had on the educational and human development of minority youth. At the time, such arguments were unheard of, and could easily have been dismissed by a judge as frivolous. Would Thurgood Marshall have filed this case if he knew a likely result could have been sanctions? One person's ideaof a frivolous claim may easily be another's idea of a basic constitutional right. Civil rights groups are accordingly strongly opposed to the Brown amendment.

Judge Pointer, the chairman of the committee that first proposed the 1993 rule 11 change to the Judicial Conference, testified that the reason for the change was to give the courts greater flexibility. Oftentimes plaintiffs are technically, and unknowingly, in violation of rule 11, and the reasoning was that in such cases it is unjust to make sanctions mandatory. We tend to agree with that reasoning. Aggrieved parties should not be dissuaded from filing suit for fear that they will be fined because the claims they believe are legitimate will be found to be frivolous. At a minimum, the issue needs further study. We therefore oppose the Brown amendment.

Argument 2:

Frivolous Federal lawsuits should be discouraged, but not on this bill. Our intention is to keep this product liability reform bill as unencumbered by extraneous issues as possible, because the more issues that are attached to it the more reasons some Senators will have for voting against it. We will be happy to consider this issue in the future, but for now we must vote against the Brown amendment.